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Nos. 99-244 and 99-253

In the Supreme Court of the United States

MOBIL OIL EXPLORATION AND PRODUCING SOUTHEAST, INC., PETITIONER

v.

UNITED STATES OF AMERICA

MARATHON OIL COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the United States materially breached or repudiated a federal off-shore oil and gas lease by enacting a statute (since repealed) that could have effected a delay in regulatory approval of exploration operations when petitioners failed, in any event, to achieve other express conditions precedent to their exploration rights under the lease.

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OPINIONS BELOW

The opinion of the court of appeals upon panel rehearing (Pet. App. 1a-21a) is reported at 177 F.3d 1331.[1] The original opinion of the court of appeals that was

[1] Unless otherwise noted the citations in this brief to "Pet. App." are to the appendices of the petition filed in No. 99-244.

subsequently withdrawn (Pet. App. 22a-39a) is reported at 158 F.3d 1253. The opinion of the Court of Federal Claims (Pet. App. 40a-93a) is reported at 35 Fed. Cl. 309.

JURISDICTION

The judgment of the court of appeals was entered on May 13, 1999. A petition for rehearing was denied on May 13, 1999 (Pet. App. 94a-95a). The petition for a writ of certiorari in No. 99-244 was filed on August 10, 1999. The petition for a writ of certiorari in No. 99-253 was filed on August 11, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1953, Congress enacted the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. 1331 *et seq.* The Outer Continental Shelf (OCS) is the submerged land beneath navigable waters on the Continental Shelf beginning seaward of the coastal waters within the jurisdiction of the individual States. See 43 U.S.C. 1301(a) and (b), 1331(a). The States assert jurisdiction over the waters and submerged lands within three miles of their coasts. Pursuant to the OCSLA, the federal government asserts jurisdiction over the OCS and ownership of the mineral resources found there. Pet App. 2a; 43 U.S.C. 1332, 1333.

The OCSLA establishes a detailed framework for issuing mineral leases and for the approval of related activities on the OCS. The Secretary of the Interior is authorized to administer the Act's provisions relating to the leasing of the OCS. The Secretary is also directed to promulgate rules and regulations to carry out those provisions, including regulations for the prevention of waste and conservation of the natural resources of the OCS. 43 U.S.C. 1334, 1337 (1994 & Supp. III

1997). The Secretary is required to conduct environmental analyses and to offer OCS leases by competitive bidding. 43 U.S.C. 1337(a) (1994 & Supp. III 1997).

An OCS lease grants the lessee a priority over others to submit plans for exploration, production, or development of oil and gas for the leased portion of the OCS.[2] Before the lessee may actually explore and develop the leased area, however, numerous specified conditions must be satisfied under the leases. In particular, the lessee must obtain mandatory state and federal approvals for the plan of exploration. Pet. App. 3a-4a. The purchase of the lease rights and payment of the lease rental payments do not guarantee the lessee that any of the approvals required for exploring and developing the resources in the OSC will be granted. As this Court explained in *Secretary of the Interior* v. *California*, 464 U.S. 312, 339 (1984):

> Under the plain language of OCSLA, the purchase of a lease entails no right to proceed with full exploration, development, or production * * * ; the lessee acquires only a priority in submitting plans to conduct those activities. If these plans, when ultimately submitted, are disapproved, no further exploration or development is permitted.

For example, in order to proceed with exploration, the lessee must submit a plan of exploration for approval by the Secretary. 43 U.S.C. 1340(b), 1340(c)(1). The Secretary may approve an exploration plan only if he determines that the plan is consistent with the OCSLA, the applicable federal regulations and the

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[2] See *Secretary of the Interior* v. *California*, 464 U.S. 312, 317, 337 (1984); *Tribal Village* v. *Hodel*, 869 F.2d 1185, 1187 (9th Cir. 1988), cert. denied, 493 U.S. 873 (1989).

terms of the lease. 43 U.S.C. 1340(c)(1). The Secretary must disapprove an exploration plan if the proposed activity is likely to cause serious harm or damage to life (including aquatic life), to property, to any mineral, to the national security or defense, or to the marine, coastal, or human environment. *Ibid.*

Under the OCSLA, the lessee also may not engage in any exploration until it has complied with the state-approval requirement of the Coastal Zone Management Act of 1972 (CZMA), 16 U.S.C. 1456(c)(3)(B). See 43 U.S.C. 1340(c)(2). To satisfy this requirement, the lessee must provide a certification that each activity described in the exploration plan conforms with the coastal zone management program of the affected State. 16 U.S.C. 1456(c)(3)(B); 30 C.F.R. 250.203. If that State objects to the certification, the lessee may appeal to the Secretary of Commerce, who may override the State's objection only upon a finding that the plan is consistent with the objectives of the CZMA or is necessary in the interest of national security. 43 U.S.C. 1340(c)(2); 16 U.S.C. 1456(c)(3)(B)(i)-(iii).

If the lessee's plan of exploration contemplates the discharge of any pollutants into the ocean, the Federal Water Pollution Control Act, 33 U.S.C. 1251 *et seq.*, further requires the lessee to obtain a National Pollutant Discharge Elimination System (NPDES) permit from the Environmental Protection Agency. 33 U.S.C. 1311(a), 1342(a). An NPDES permit cannot be obtained unless the lessee has first complied with the requirements of the CZMA. 16 U.S.C. 1456(c)(3)(A).

If the lessee's plan for exploratory drilling for oil or gas is approved and proves successful, the lessee must then obtain approval of a development and production plan before pursuing further activity. 43 U.S.C. 1351. These mandatory development and production plans

are also subject to the state approval requirements of the CZMA. See 43 U.S.C. 1351(d).

When environmental harm or injury to the national defense either occurs or is threatened by drilling activity, the OCSLA either permits or requires cancellation of the leases by the Secretary. In that situation, compensation is provided to the lessee under the OCSLA. See 43 U.S.C. 1334(a)(2), 1340(c)(1), 1351(h). Leases may also be canceled for failure to comply with the requirements of the OCSLA or the regulations issued under that statute. See 43 U.S.C. 1334(c) and (d).

2. a. In 1981, the Secretary issued oil and gas leases to petitioners for federal OCS lands located off the coast of North Carolina. Each petitioner holds a one-third interest in the leases. Pet. App. 4a. Petitioners joined with the owners of adjacent OCS leases to form a single exploration unit, known as the Manteo Unit. *Id.* at 4a-5a. In 1989, the Manteo Unit proposed drilling an exploratory well about 45 miles east of Cape Hatteras. In July 1990, the State of North Carolina objected to the proposal and the Manteo Unit failed to obtain the required CZMA certification for their exploration plan. *Ibid.*

b. In August 1990, Congress enacted the Outer Banks Protection Act (OBPA), Pub. L. No. 101-380, § 6003, 104 Stat. 555. The OBPA required the Secretary of the Interior to conduct an environmental analysis before allowing exploration or development of the OCS offshore of North Carolina. OBPA § 6003(c)-(e), 104 Stat. 556-557. Congress was concerned that there was insufficient knowledge of the fish species and of the physical and oceanographic characteristics of that area. OBPA § 6003(b)(1)-(5), 104 Stat. 555. Congress therefore established the Environmental Sciences Review Panel to prepare and submit findings and recom-

mendations to the Secretary (OBPA § 6003(e)(2)(A), 104 Stat. 557):

> (i) assessing the adequacy of available physical oceanographic, ecological, and socioeconomic information in enabling the Secretary to carry out his responsibilities under the [OCSLA] with respect to authorizing [leasing, exploration, and development]; and
>
> (ii) if such available information is not adequate for such purposes, indicating what additional information is required to enable the Secretary to carry out such responsibilities * * *.

The OBPA directed the Secretary not to allow exploration or development on OCS lands offshore of North Carolina until the later of October 1, 1991, or 45 days of continuous session of Congress after the Secretary submitted a written report certifying that, upon consideration of the Review Panel's findings and recommendations, the Secretary possessed sufficient information to carry out his responsibilities under the OCSLA. OBPA § 6003(c)(3), 104 Stat. 556.

In view of the requirements imposed by the OBPA, the Department of the Interior temporarily suspended all development and exploration under the OCS leases offshore of North Carolina on August 18, 1990. At that time, the Department also stayed any obligation of the lessees to pay lease rentals. Pet. App. 6a.

c. On August 20, 1990, Mobil, on behalf of the Manteo Unit, submitted a revised and final plan of exploration to drill one exploratory oil well. Pet. App. 6a. On November 19, 1990, the State of North Carolina formally objected to certification of the exploration plan under the CZMA. The Manteo Unit appealed the

formal objections of the State to the Secretary of Commerce. *Ibid.*

d. In January 1992, the Environmental Sciences Review Panel issued its final report required under the OBPA. In April 1992, the Secretary of the Interior issued a report to Congress certifying that he possessed sufficient information to perform his obligations under the OCSLA for approval of the Manteo Unit proposal. Pet. App. 6a. That certification removed the temporary bar to action on the Manteo Unit exploration plan imposed by the OBPA. *Ibid.* See OBPA § 6003(c)(3), 104 Stat. 556. Petitioners could not proceed with their proposed exploration of the Manteo Unit, however, because of the objection of the State of North Carolina to the Manteo Unit CZMA certification and because an NPDES permit had not been obtained. Pet. App. 6a. See 16 U.S.C. 1456(c)(3)(A) and (B).

The Secretary deferred action on the Manteo Unit exploration plan until the agency could complete two studies recommended by the Environmental Sciences Review Panel. Petitioners sought and were granted further suspensions of the leases contained in the Manteo Unit until the studies were completed and until the appeals by petitioners from the objections of North Carolina to CZMA certification were decided by the Secretary of Commerce. Pet. App. 6a-7a.

e. In September 1994, the Secretary of Commerce rejected the appeal of the Manteo Unit from North Carolina's objections to the exploration plan. The Secretary of Commerce found that the proposed plan of exploration and proposed discharges of drilling wastes for the Manteo Unit were neither "consistent with the objectives of the CZMA nor necessary in the interests of national security." Pet. App. 6a.

In November 1994, after the completion of the two environmental studies, and after the Secretary of Commerce refused to override North Carolina's objections to CZMA certification for the Manteo Unit exploration plan, the Secretary of the Interior lifted the suspension of petitioner's leases. Pet. App. 7a.

f. In 1996, Congress repealed the OBPA. Pub. L. No. 104-134, Tit. I, § 109, 110 Stat. 1321-177. Because the objections of North Carolina to certification of the Manteo Unit exploration plan under the CZMA were upheld by the Secretary of Commerce, however, that exploration plan remains barred to this day.

3. a. Petitioners brought the present action in the Court of Federal Claims claiming that the enactment of the OBPA in 1990 effected a material breach and an anticipatory repudiation of their OCS leases. The trial court awarded summary judgment to petitioners (Pet. App. 40a-93a) and entered a final judgment awarding them "restitution of their up-front [lease] payments" in a total amount exceeding $156 million. *Id.* at 2a. See 99-253 Pet. App. 44a.

b. The court of appeals reversed the judgment of the district court. Pet. App. 1a-16a. The court of appeals held that the lease agreements had not been breached by either party: "[r]ather, Marathon has been unable to obtain the necessary Government approvals that would allow it to go forward with exploration of the lease site, a problem for Marathon that arose in 1989, before the OBPA was enacted, and continued after the OBPA was repealed." *Id.* at 16a. The court rejected petitioners' argument that the OBPA was "a supervening act" that made performance impossible. *Ibid.* The court noted that the "OBPA was not the cause of Marathon's inability to obtain issuance of the required permits and approvals for its proposed oil exploration." *Ibid.* Al-

though the lessees paid a substantial up-front cash bonus and annual rents in exchange for the "exclusive right and privilege to drill for, develop, and produce oil and gas resources" (*id.* at 10a), that right "was expressly conditioned on compliance with a complex fabric of statutory and regulatory provisions, which included involvement by both federal and state agencies. The lessees were both knowledgeable and sophisticated purchasers, and entered into these leases with their legal eyes wide open." *Ibid.*

The court of appeals held, "[w]hatever restraints on secretarial actions were imposed by the OBPA essentially had no effect upon these OCS leases because exploration could not proceed without North Carolina's concurrence in the POE's CZMA consistency certification or the override provided by law." Pet. App. 12a. The court noted that "North Carolina objected from the beginning to the Manteo Unit's proposed exploration as being inconsistent with its coastal zone program under the CZMA * * *; North Carolina maintained [its] * * * objections throughout the time that the moratorium imposed by the OBPA was effective." *Id.* at 12a-13a. The court concluded, "[u]nder the circumstances of this case, to treat Marathon's failure to obtain the necessary approvals and permits for exploratory activity as a breach of contract by the Government would be to eviscerate these salutary protections of the nation's fragile coastal lands and waters." *Id.* at 13a.

The court rejected petitioners' contention that, "even if their leases are subject to state objection over the CZMA consistency certification, the OCSLA provides for cancellation of the leases and restitution in such a situation." Pet. App. 14a. The court explained, "the lessee contracted for the exclusive opportunity to explore in a certain area; the inability of a lessee to ex-

plore, if not attributable to the Government, does not create an entitlement to any refund of the consideration paid to obtain the lease." *Id.* at 15a.[3]

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review is therefore not warranted.

1. The broad legal propositions that petitioners purport to frame for review by this Court are not presented in this case. To the contrary, as the court of appeals carefully explained, the decision in this case involves only the straightforward application of the settled precedents of this Court to the particular facts of this case.

a. The court of appeals properly held that, because petitioners failed to comply with the certification requirements of the CZMA, there is no basis for sustaining an award of restitution in this case. As this Court explained in *Secretary of the Interior* v. *California*, 464 U.S. at 340, "the purchase of an OCS lease, standing alone, entails no right to explore for, develop, or produce oil and gas resources on the OCS." Although the leases gave the lessees the "exclusive right and privilege to drill for, develop, and produce oil and gas resources," that right "was expressly conditioned on compliance with a complex fabric of statutory and regulatory provisions, which included involvement by both federal and state agencies." Pet. App. 10a. In particular, both the leases and the OCSLA expressly require

[3] Because the court of appeals reversed the trial court's finding of liability, the court did not address the challenges raised by the government to the manner in which the lower court calculated the award of restitution. Pet. App. 16a.

lessees to satisfy the requirements of the CZMA as a precondition of the right to explore for minerals on the OCS. The failure of petitioners to satisfy those requirements of the statute and the leases precludes their claims in this case. *Ibid.*

As the court of appeals further explained, "[w]hatever restraints on secretarial actions were imposed by the OBPA essentially had no effect upon these OCS leases because exploration could not proceed without North Carolina's concurrence" or without "the override" of the State's objections by the Secretary of Commerce. Pet. App. 12a. As this Court held in *Secretary of the Interior* v. *California*, 464 U.S. at 339, when, as in the present case, the requirement of CZMA certification is not satisfied by the lessee, "no further exploration or development is permitted" under the express, controlling terms of the leases. Because petitioners failed to satisfy this contractual condition precedent to their right to explore under the leases, they lack any basis for asserting a claim for restitution in this case.

In a few narrow contexts, the OCSLA has expressly authorized the cancellation of leases and the payment of restitution to lessees. See 43 U.S.C. 1334(a)(2), (c) and (d), 1340(c)(1), 1351(h)(1) and (2). The statute does not, however, provide for restitution or other compensation when development plans are disapproved because of the objection of a State under the CZMA. 43 U.S.C. 1351(h)(2)(A). When CZMA certification is denied, the lessee's only right is to amend the plan or submit a new one. See 43 U.S.C. 1340(c)(2); 16 U.S.C. 1456(c)(3)(B).

As the court of appeals explained, "North Carolina objected from the beginning to the Manteo Unit's proposed exploration as being inconsistent with its coastal zone program under the CZMA." Pet. App. 11a. Petitioners are "knowledgeable and sophisticated purchas-

ers, and entered into these leases with their legal eyes wide open." *Id.* at 10a. They expressly bore the risk of their failure to obtain approval of their exploration plans under the CZMA. Because petitioners voluntarily assumed that risk, and then failed to satisfy that contractual precondition for exploration, the court of appeals correctly concluded that there is no basis for rescission of the contract or for the award of restitution in this case.

b. The court of appeals also correctly rejected petitioners' contention that the enactment of the OBPA materially breached their leases. Petitioners erroneously assert that the mere fact that the OBPA *could* have delayed approval by the Secretary of the Interior of their plans for exploration of the Manteo Unit constitutes a material breach of the leases that entitles them to restitution. A material breach of a contract, however, is one that goes to the essence of the contract and defeats its object. See, *e.g.*, *Thomas* v. *HUD*, 124 F.3d 1439, 1442 (Fed. Cir. 1997).[4] As the court of appeals explained, wholly without regard to the enactment of the OBPA, petitioners were at no time in a position to obtain the necessary approval of their pro-

[4] The remedy of restitution is available only if a breach is material to the performance of the contract as a whole. See, *e.g.*, *Everett Plywood Corp.* v. *United States*, 512 F.2d 1082, 1093-1094 (Ct. Cl. 1975) (denying a claim for restitution of amounts incurred performing the breached contract because the breach did not defeat the purpose of the contract); *United States* v. *Western Cas. & Sur. Co.*, 498 F.2d 335, 339-340 (9th Cir. 1974) (citing 5 Arthur Linton Corbin, *Corbin on Contracts* § 1104, at 562 (1964), and noting that restitution is available only when the breach goes to the "essence" of the contract); John D. Calamari & Joseph M. Perillo, *Contracts* § 15-3, at 649 (3d ed. 1987); 1 George E. Palmer, *The Law of Restitution* § 4.7, at 427 (1978).

posed exploration plans. Instead, at all times, petitioners were disabled from proceeding with their proposed plan of exploration because North Carolina independently objected to the CZMA certification and the Secretary of Commerce declined to override that objection. Pet. App. 12a. Moreover, although the OBPA has now been repealed, petitioners remain unable to proceed with exploration of the Manteo Unit because of their continuing inability to satisfy the requirements of the CZMA. The court of appeals thus correctly held that no delay to petitioners' exploration plans resulted from the OBPA: "had [the Secretary of the Interior] been free to act, he could not have issued any permits for exploration so long as North Carolina's objections remained in force." *Ibid.*

The enactment (and subsequent repeal) of the OBPA therefore did not effect a material breach of the leases. Pet. App. 12a-13a. In the only other similar case, the court of appeals reached the same conclusion. See *Sun Oil Co.* v. *United States*, 572 F.2d 786, 804-806 (Ct. Cl. 1978) (rejecting a claim for damages for the government's delay of OCS permit approvals where other independent causes supported the same delay).

Petitioners assert that the court of appeals erred in relying on the bar to their exploration plan imposed by the CZMA because they might, theoretically, have engaged in other lease operations if the OBPA had not been in effect. This argument ignores the reality that, whatever other steps petitioners might have attempted to take, they could not have proceeded with exploration and production in the absence of CZMA certification. Moreover, throughout the limited period that the OBPA was in effect, petitioners never proposed any alternative exploration or production plans. Instead, they pursued litigation in the Department of Commerce

and in the federal courts to attempt to compel approval of their existing plan under the CZMA. See Pet. App. 14a n.1.

Even though petitioners failed to pursue alternative exploration plans during the period that the OBPA was in effect, they still remain able to pursue such additional plans if they choose to do so. If such activities are proposed in the future, petitioners will, of course, continue to be subject to the requirements of the CZMA. The OBPA, however, has been repealed and will obviously have no effect on them.

2. Petitioners claim (99-253 Pet. 20) that the decision in this case conflicts with the established principle of contract law that restitution may be awarded when performance is excused by a supervening impossibility. The certification requirement of the CZMA, however, is not an unanticipated "supervening" event. It is instead an express condition precedent that limits petitioners' right of exploration under the leases. The refusal of the State of North Carolina to withdraw its objections to petitioners' exploration plan prevents the plan from proceeding; it is not, however, an unanticipated event rendering performance "impossible" under contract law. See 6 Arthur Linton Corbin, *Corbin on Contracts* § 1327, at 341 (1962) "A promise to induce action or forbearance by a third person involves the act and will of another. That his will turns out to be stubborn does not show that the performance is impossible.").

It is thus petitioners, not the court of appeals, that abandon established principles of contract law. In particular, petitioners err in their purported reliance (99-244 Pet. 13-16) on the Restatement (Second) of Contracts. The Restatement makes clear that the failure of a party to accomplish a condition precedent to its rights under a contract does not constitute a breach by the

other party when, as in this case, the claimant "assumed the risk that he would have to perform in spite of such a failure." See Restatement (Second) of Contracts §§ 239(2), 267(2) (1981). Petitioners unquestionably entered into the leases knowing that their right to proceed with exploration was contingent on obtaining numerous permits and approvals, including certification of their plan under the CZMA. See *Secretary of the Interior* v. *California*, 464 U.S. at 339. Petitioners' failure to comply with those requirements creates no claim for breach against the United States. See *id.* at 339-340.

Any obligation that the government may have had to cooperate in operations under the leases never ripened because petitioners failed to satisfy the requirements of the CZMA. Even if petitioners had obtained CZMA certification, the OBPA did not render performance by either party impossible. At most, it could have caused delay in the ultimate approval of the drilling plan—although, on the facts of this case, in view of the State's objection under the CZMA, it is obvious that the OBPA did not *in fact* cause any such delay. Even the sort of hypothetical delay posited by petitioners would not, in any event, have made performance impossible—it would only have delayed it. Even now, if petitioners were able to propose a plan that was acceptable to the State of North Carolina and thereby obtain the required CZMA certification, petitioners would remain able to proceed with drilling operations, for the leases remain in force and effect to this day.

This case thus does not present the broad questions of contract law posed by petitioners. The fact-bound application of the settled precedents of this Court (and of contract law generally) does not warrant further review.

3. Petitioners err in claiming (99-244 Pet. 11) that the decision of the court of appeals conflicts with the holding of this Court in *United States* v. *Winstar Corp.*, 518 U.S. 839, 895 (1996), that government contracts are ordinarily subject to "the law applicable to contracts between private individuals." Nothing in the decision of the court of appeals departs from that principle. Instead, the court of appeals merely applied well-established contract law principles to the particular facts of this case.

Petitioners also err in asserting (99-244 Pet. 18) that the decision in this case conflicts with *Far West Federal Bank, S.B.* v. *Office of Thrift Supervision*, 119 F.3d 1358 (9th Cir. 1997). In *Far West*, the government encouraged investors to recapitalize a thrift savings institution by granting them regulatory forbearance. Congress thereafter passed a new statute that "completely overhaul[ed] the structure of federal thrift regulation." *Id.* at 1362. The government expressly argued in that case that the new Act "abrogated existing forbearance agreements." *Ibid.* In view of the fact that the agency expressly repudiated its prior forbearance agreements, the court of appeals held that restitution to the investors was an appropriate remedy. *Id.* at 1365.

In the present case, however, unlike in *Far West*, the government has not abrogated its contractual undertakings. To the contrary, petitioners failed to fulfill a precondition to their own contractual rights by failing to obtain CZMA certification for their exploration plan. The initial delay in operations under the leases occurred because of the lack of the required CZMA certification. The delay in operations continues to this very day for that same reason. See Pet. App. 14a n.1. The leases have not been abrogated by the government; indeed, they remain in effect today. The decision in *Far West*

has no application to the manifestly different facts of this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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